No. 95-895

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

DANIEL C. MILLER,

Petitioner,

—v.—

DONALD L. DEMUTH,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPERIOR COURT OF PENNSYLVANIA

PETITIONER'S REPLY MEMORANDUM

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Dated: January 17, 1996

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REPLY TO RESPONDENT'S OPPOSITION TO THE PETITION FOR CERTIORARI

DeMuth's argument that Miller waived the constitutional claims presented here has been rejected by each court to consider this matter. The trial court, which first considered them,[1] said: "[t]he defendant first suggests

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[1] On June 30th, 1993 Miller's trial counsel filed a motion for post trial relief seeking entry of Judgment Notwithstanding the Verdict, which said:

> 1. The contract claim of Plaintiff, Donald L. DeMuth ("DeMuth"), and the eventual jury verdict were premised on DeMuth's assertion that Miller was terminated because of "homosexuality," which was a specifically enumerated basis for termination for "cause" set forth in the employment contract which was found by the jury to have been in effect at the time of Miller's termination.
>
> 2. The contract provision enumerating homosexuality as basis for termination for cause violates public policy, should not be enforceable, and therefore cannot properly support the jury verdict in favor of DeMuth based on this provision.
>
> 3. Miller requested at trial that DeMuth's contract claim be dismissed since the aforesaid contract provision violates public policy by a motion for compulsory non-suit and again by motion for directed verdict; both motions were denied by the Honorable Judge Hess.

that the judgment must be entered, notwithstanding the verdict, for the reason that the contract whereby the plaintiff was permitted to fire the defendant for being gay violated either public policy or *state and federal constitutions*." (Petitioner's Appendix 51a, merits addressed at 51a - 54a) (emphasis supplied). Later, the Superior Court ruled: "[t]he trial court, having exercised its discretion in responding to the constitutional issues *raised in the defendant's post trial brief and at oral argument*, preserved such claims for review." (Petitioner's Appendix 13a-14a (citations omitted), merits addressed 14a-56a) (emphasis supplied). Finally, the Pennsylvania Supreme Court declined DeMuth's cross-petition for allowance of appeal based on his contention that these arguments should never have been addressed by the two lower courts.

Similarly meritless is DeMuth's attempt to reargue the Pennsylvania Court's finding that the constitutional arguments were preserved for consideration by asserting that this case is marked by some failure to develop a factual record on the constitutional claims. As is set forth in detail

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> 4. The trial court erred in failing to grant a compulsory non-suit or directed verdict on the basis that the aforesaid contract provision which formed the basis of DeMuth's recovery on his contract claim violates public policy. Miller is entitled to judgment as a matter of law on DeMuth's contract claim.

Then, on Sept 23, 1993, in his first brief containing legal arguments in the course of this case, Miller detailed the constitutional arguments set forth here. Of course, DeMuth responded, including by insisting that the constitutional arguments had been waived. The trial court disagreed, and went on to consider and pass upon these arguments.

in the petition for *certiorari*, the only issue raised is a legal one, as to the proper application of constitutional principles. As DeMuth's opposition brief confirms, the only facts relevant to this claim are entirely undisputed: (1) Miller was fired for being gay; (2) there was no other "cause" for his firing; and (3) the monetary penalty sought to be enforced via court ordered judgment is a direct consequence of the firing for "homosexuality."

* * *

Existing constitutional law provides that state action may not be employed to discriminate based on any classification where there is no rational relationship between it and, in the case of employment discrimination, job performance. However, as is set forth in detail in Miller's petition, there has been a great deal of confusion in the lower federal and state courts over the application of this principle to lesbians and gay men, resulting in a kind of exemption, under which courts have not evaluated sexual orientation classifications as they do others.

DeMuth's argument that there is no state action at issue in court enforcement of DeMuth's penalty exemplifies the basis for Miller's petition. For example, the opposition brief cites the following passage:

> [W]e follow other courts which have indicated that where a court acts to enforce the right of a private party which is permitted but not compelled by law, there is no state action for constitutional purposes **in the absence of a finding that constitutionally impermissible discrimination is involved**. *United Egg Producers v. Standard Brands, Inc.*, 44 F.3d 940, 943 (11th Cir. 1995).

Brief in Opposition at 13 (emphasis supplied). Ignoring the possibility that the discrimination at issue here is "constitutionally impermissible," DeMuth insists that Miller's equal protection claim is not cognizable in the absence of legislation prohibiting employment discrimination against gay people, and suggests that a court ruling finding that state action which enforces discrimination along those lines would be equivalent to judicial legislation. Of course, this would be true only if the Constitution did not afford lesbians and gay men *any* protection, including that which it affords all others.

This Court should address the common apprehension that the Constitution applies differently to classifications which disadvantage lesbians and gay men as it continues, notwithstanding that a host of this Court's cases establishes that state action may not enforce bias toward classifications not legislatively protected, or accorded heightened scrutiny, *Gregory v. Ashcroft*, 501 U.S. 452 (1991) (holding that Missouri's requirement that judges retire at 70 passed constitutional muster because it *does* have a rational basis); *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432, 448 (1985) (concerning the mentally disabled, holding that government action may not be based on "mere negative attitudes, or fear"); *United States Dep't of Agriculture v. Moreno*, 413 U.S. 528, 534 (1973) (concerning "hippies," holding that desire to harm a politically unpopular group cannot constitute a *legitimate* governmental interest).

* * *

Respondent's assertion that this case is not about Miller's being fired because he is gay strains credibility. If DeMuth had not fired Miller, he would not have opened his own practice. Further, if the contract at issue here did

not include "homosexuality" as cause for firing, the "non-compete" clause would not apply, and then if DeMuth had fired his employee for being gay, Miller would have been free to open a practice, and doing so would not have subjected him to a $110,000 judgment. This case turns on the propriety of court enforcement of a clause which allowed DeMuth to collect money from Miller *because he is gay*.

* * *

Similarly, respondent's suggestion that only legislation is subject to constitutional standards is seriously misguided. The confusion in the opposition brief concerning Miller's petition can be clarified as follows. Court enforcement of a blatantly discriminatory contract clause via entry of a judgment is state action, and state action must be used constitutionally.[2] In cases involving government action, the lower federal and state courts require this Court's clarification of how established equal protection law applies to sexual orientation classifications.[3]

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[2] The cases which respondent endeavors to distinguish at footnote 9 of the brief in opposition simply illustrate that the mechanisms made available via a judgment are a use of state powers to which constitutional standards, in this case those of equal protection, apply.

[3] The cases which respondent endeavors to distinguish at footnote 12 of the opposition brief simply demonstrate the history of the issue, and in some cases the confusion surrounding it. Therefore, they involve government action, in some instances where the government acts as employer. Petitioner disagrees with the assertion, contained in respondent's footnote 12, that the *Shahar* case involved a determination of whether the Attorney General's actions were state action, however this is of little

Because the lower court opinions in this matter turn on this issue, and because the facts of this case are clear and undisputed, it provides an opportunity to resolve an important issue which this court has not, but should, consider.

Respectfully submitted,

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import as the district court opinion had been overturned. *Shahar v. Bowers*, 70 F.3d 1218 (11th Cir. 1995).